

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 75-7502

To be argued by  
ABRAHAM E. FREEDMAN

ORIGINAL

In The  
**United States Court of Appeals**

For The Second Circuit

ANDY DINKO individually and on behalf of the members of  
the National Maritime Union of America,

*Plaintiff-Appellant,*

vs.

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime Union of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officer's Pension Plan and individually, and the AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

*Defendants-Appellees*



## BRIEF FOR DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7502

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ANDY DINKO individually and on behalf of the members of  
the National Maritime Union of America,

Plaintiff-Appellant,

-against-

SHANNON J. WALL, as President of the National Maritime  
Union of America and individually, JOSEPH CURRAN, as  
past President of the National Maritime Union of America  
and individually, MEL BARISIC, as Secretary-Treasurer of  
the National Maritime Union of America and individually,  
PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice  
Presidents of the National Maritime Union of America and  
individually, ANDREW RICH, as New York Branch Agent of  
the National Maritime Union of America, ABRAHAM E. FREEDMAN,  
LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of  
the National Maritime Union Officer's Pension Plan and  
individually, and the AMALGAMATED BANK OF NEW YORK, as  
Successor Trustee of the National Maritime Union Officer's  
Pension Plan and Trustee for the National Maritime Union  
Staff Pension Plan,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BRIEF ON BEHALF OF APPELLEES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. Was the holding of the court below that appellant's letter of December 17, 1974 failed to satisfy the statutory prerequisite of Section 501(b) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501(b), of requesting the union or its officers "to sue to recover damages or secure an accounting or other appropriate relief" clearly erroneous"?
- B Did the court below abuse its discretion in holding that appellant had not made an adequate showing of "good cause" under Section 501(b) and that, accordingly, the ex parte order granting leave to commence this action should be vacated?

### STATEMENT OF THE CASE

This action was commenced by appellant Andy Dinko against the defendant officers of National Maritime Union of America, AFL-CIO ("NMU") pursuant to Section 501 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (the "Act"). In his complaint Mr. Dinko alleged that these officers have breached their fiduciary obligations to NMU in several different respects. Essentially these alleged violations can be reduced to three categories:

1. Allegations that relate to the revision by the Union of the NMU Officer's Pension Plan;
2. Allegations that certain financial and membership data has not been made available to appellant and other NMU members; and
3. Allegations that the defendant officers have misappropriated Union funds.

Under Section 501(b) of the Act, appellant was required to obtain leave of the court before being permitted to commence this action. On January 27, 1975, the district court (Frankel, J.) granted appellant's application for leave to commence this action. Appellant's application was heard ex parte - the defendant officers having no opportunity to oppose the application.

Upon being served with the complaint herein the defendant officers promptly filed an answer and noticed appellant's deposition. After appellant's deposition was taken over two sessions - on April 15 and April 21, 1975 - defendant officers moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that the court below lacked jurisdiction over the subject matter of the action. This motion was buttomed on the contention of defendant officers that "good cause" did not exist to commence this action in the first instance. In support of their motion defendants relied upon appellant's deposition and other pertinent documents.

On August 4, 1975, the district court (Werker, J.) granted the motion to dismiss on the ground that appellant had failed to satisfy two of the prerequisites set forth in Section 501(b):

- a) The requirement of submitting a request to the Union or its officers to sue to recover damages or secure an accounting or other appropriate relief; and
- b) The requirement of showing "good cause" to commence the action.

Accordingly the district court held that it lacked jurisdiction over the subject matter of the action and dismissed the complaint without prejudice to appellant in commencing a new action upon compliance with the procedural requirements of Section 501(b).

The request which appellant contends satisfies Section 501(b) is dated December 17, 1974.<sup>1</sup> That letter first seeks to have the action of the Union membership revising the NMU Officer's Pension Plan declared void and then states in pertinent part:

"I demand a complete accounting of all union expenditures including the officers staff pension plan and all benefits associated therewith. In addition I further demand a true and accurate accounting of all officers and staff, who are participating recipients in this plan; as well as monies expended or allocated for each individual; family benefits and health benefits, etc.

I further demand that an outside independent certified public accountant be selected to audit all expenditures of the NMU; and a membership committee to set up including outside impartial observers to see that members will be protected against the continuous misappropriation of Union Funds.

I demand that no monies be used out of the NMU General Treasury for the Officers Staff Pension Plan. . .

If you do not reply within ten (10) days from the above date, I will immediately instruct my attorneys to proceed with law suits in the Federal Courts."

The allegations of wrongdoing against defendant officers are set forth at paragraph 15 of the complaint.<sup>2</sup> The affidavit and supporting documents submitted by the defendant officers below demonstrated the lack of "good cause" for each and every allegation as follows:

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<sup>1</sup> The letter is attached as Exhibit IV to Part A of Appellant's Appendix which unfortunately is not paginated.

<sup>2</sup> See Part C of Appellant's Appendix.

1. Paragraph 15(a) of the complaint attacks the sufficiency of the "spread" or notice published in the November, 1974 PILOT<sup>3</sup> which described the proposed revision of the NMU Officer's Pension Plan to be voted on at all regular branch membership meetings on November 25, 1974. The article was published pursuant to Article 4 of the NMU Constitution which requires that changes in Union policy requiring membership approval be spread in the PILOT before the membership vote. Article 4 provides in pertinent part:

"Section 1 - Principle: All decisions of the National Council, and the National Office between Conventions, which change the established policies, programs, and procedures of the Union must first be approved by the membership before they are made effective.

Sec. 2 - Method: Membership approval referred to in Section 1 of this Article shall be obtained in the following manner:

(a) The decision of the National Council and/or the National Office shall be spread in full in the NATIONAL MARITIME UNION PILOT or a special newsletter, provided that action on the decision is not required before the PILOT or special newsletter can be published and distributed to the membership. The decision shall then be read at the regular membership meeting in each Branch office operated by the Union, provided that in the event a regular membership meeting is not scheduled within the time necessary for action upon the decision, the decision shall then be read in full at a special membership meeting called for that purpose. After discussion by the membership, action upon the decision shall be taken by vote of the membership present. The approval of a majority of the total members voting in all Branches

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<sup>3</sup> The "PILOT" is the official organ of the NMU and is published monthly. The article in question is set forth as Exhibit I to Appellant's Appendix.

shall be required in order to make the decision operative.

(b) Emergency decisions requiring immediate action for the protection of the Union shall be read at regular membership meetings in all Branches. In the event a regular membership meeting is not scheduled within the time necessary for action upon the decision, the decision shall then be read in full at a special membership meeting called for that purpose. After discussion by the membership, action upon the decision shall be taken by vote of the membership present. The approval of a majority of the total members voting in all Branches shall be required in order to make the decision operative."

The proposed NMU Staff Pension Plan and the NMU Officers Pension Plan which it replaced are lengthy documents which could not readily be republished in their entirety in the PILOT.(17)\* Accordingly, a summary of the Staff Plan and its differences from the Officer's Plan was published in the PILOT and the full texts of the Plans were made available for inspection during the month of November, 1974 at all NMU branch offices.

In his verified application and at his deposition appellant charged that the PILOT "spread" was inaccurate, incomplete and misleading because. (18):

1. The differences between the proposed and existing Plans were not enumerated;
2. The formula upon which benefits were to be computed was not stated;
3. The amount of money to be allocated and the type of benefits payable were not described;
4. The total amount to be funded from the NMU treasure was not stated;

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\* Unless otherwise noted page references are to the page numbers of the affidavit of Stanley B. Gruber which is contained at Part D of Appellant's Appendix.

5. The cost to each member was not set forth; and
6. There was indication that the NMU National Office would determine eligibility and compute and certify benefits.

A reading of the article in dispute clearly answers the charges raised above. The article expressly undertakes to explain the differences between the Staff and Officer's Plans in areas of coverage, funding, costs, benefits and administration and to give the reasons why charges were proposed. It specifically states that:

1. \$350,000 will be transferred from the NMU General Fund to fund the revised Plan;
2. Contributions to the Plan from the Union will be at a rate of no more than 26% of base pay of the officers and non-officers covered by the Plan;
3. The benefit formula will be computed on the basis of earnings in the best of 5 of the last 10 years of employment instead of all service since 1963. (This change was previously approved by the membership in May, 1972);
4. The National Office will act as the Pension Committee for the Plan and will be responsible for all basic policy determinations; and
5. Officers of the union and non-officer employees, who are not otherwise covered by the Union for pension purposes, will be covered by the Plan.

The remaining allegations of wrongdoing raised by appellant are so questionable in veracity and motive that they cast a serious cloud over appellant's charges regarding the aforescribed PILOT article.

2. Paragraph 15(b) of the complaint alleges that appellant and other members of the Union were denied an opportunity to inspect the full texts of the Staff and Officer's Pension Plan. Appellant's description of his own efforts to inspect the Plan are contradictory, preposterous and shrouded with doubt. (20) Two of the other three members whom appellant claims were not permitted to inspect the Plans - Evaristo Rodriguez and Emanuel Van Eckelen - have given statements directly refuting appellant's charges. (20) Indeed, the fact that appellant would insert such clearly false statements in his affidavit and repeat such statements under oath at his deposition gives the lie to all of his charges.

3. In Paragraph 15(c) of the complaint appellant charges that it was improper not to make the full texts of the Plans available in Spanish. He supports this allegation by alleging that at least 50% of all NMU members speak Spanish. His basis for this allegation, however, is his own visual inspection at several, but not nearly all, NMU branches and what he has been told by other unnamed members. More importantly, he concedes not knowing how many of these members who speak Spanish cannot read English. (20)

4. Paragraph 15(d) of the Complaint alleges that defendants have refused to make available "an independent financial report or other adequate financial information" on the Staff and Officer's Pension Plans. However, appellant's letter of December 17, 1974, which he contends makes such a demand, does not request "an indepen-

dent financial report or other adequate financial information." It demands a "complete accounting" of the Plan. But no reasons are given for requiring an accounting. Such accountings are extremely costly, time consuming and burdensome. Without some evidence of wrongdoing they should not be ordered. Here, there are no specific allegations of wrongdoing which require an accounting. It is apparent that appellant's real purpose was to harass the Union with vexatious and burdensome demands. If appellant wishes to inspect any of the annual reports prepared by the auditors of the Plan he need only make such a request.

5. Paragraph 15(e) of the complaint alleges that appellant and other members were denied an opportunity to express their views at the New York branch membership meeting of November 25, 1974. However, appellant's version of that meeting, as given at his deposition, is contrary to the minutes of that meeting which appellant attached to his verified application and relied upon in seeking permission to start his action.<sup>4</sup> Those minutes do not show any effort by appellant to gain the floor and show that there was a debate by the membership - pro and con - on the merits of the Plan.

Perhaps the most outrageous claim made by appellant with regard to this meeting is the charge made at his deposition that no vote on the proposed Plan was taken at the meeting. This charge contradicts his own affidavit (22) and simply defies belief.

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<sup>4</sup> These minutes are contained in Exhibit III to Part A of Appellant's Appendix.

Under Article 4 of the NMU Constitution a membership vote on change in established policy is conducted in all branches and the result is determined by the total vote in all branches. Mr. Dinko admits he does not know what happened at the other branch meetings. (23) The minutes of those meetings show an overwhelming vote in favor of the proposed Plan regardless of the vote in New York. (23)

6. In Paragraph 15(f) of the complaint Mr. Dinko alleges that the defendant officers have not made available, information respecting the NMU's true and complete liabilities and disbursements. He concedes, however, that information on NMU's liabilities and disbursements are regularly published in the PILOT. (14) He is unable to say what, if anything, is not accurate about these reports. (14) Indeed, Mr. Dinko has failed to give any reason for alleging that the "true and complete" picture is not being presented in the PILOT reports and the annual LM 2 reports which NMU files with the Department of Labor. (14-15) Nor does his letter of December 17, 1974 request such information.

In short, there is no reliable evidence that such a request was ever made by Mr. Dinko or that there is a basis for such request.

7. Paragraph 15(g) of the complaint attacks the sufficiency of several individual employment contracts allegedly entered into between the Union and several non-officer staff employees. Appellant concedes that he has never seen these contracts and knows of their existence only through what he was told by others whose names he

does not know. (5-6) Article 8, Section 11(a) expressly permits the NMU National Office to establish rates of pay and fringe benefits, including pension, for Union employees. That section provides:

"(a) The employment of technical, clerical administrative and other personnel necessary for the effective administration of the Union's affairs shall be the responsibility of the National Office. The National Office is authorized to establish the compensation for such personnel, including pension, welfare and other fringe benefits. Plans or programs for providing pension, welfare and other fringe benefits may be combined with similar plans or programs for providing such benefits to officers of the Union."

Appellant's allegations on this point, as with many of his other allegations, amount to no more than an effort to embark on a burdensome fishing expedition. He can neither establish that the contracts exist nor give any hint as to what is improper about them if they do.

8. The only allegation of impropriety about these alleged contracts which appellant has specifically made is contained in Paragraph 15(h) of the complaint which complains about the failure to notify the membership of the existence of these contracts. On this point it should first be noted that there is no requirement in the NMU Constitution or statutory law that individual employment contracts with Union employees must be published in the PILOT or kept available at branch offices. Nor is there any indication that appellant or any other member has ever requested an opportunity to see such contracts. (6) Mr. Dinko's letter of December 17, 1974 surely makes no such request and his testimony regarding his verbal

requests to inspect these contracts is totally unbelievable in light of his other testimony and sworn statements. (6)

9. Paragraph 15(i) of the complaint alleges that individuals elected to union office have been appointed to different positions in order to pay them two and three times their regular salaries. This allegation is admittedly based on "hearsay" given appellant by unnamed individuals. (8-9) He was totally unable to give any facts in support of the charge. (8-9)

10. Paragraph 15(j) of the complaint alleges that union officers and employees have received "excessive and improper travel and expense allowances." The defendant officers certainly have a right to expect appellant to give some basis for this serious charge. Appellant, however, is unable to give an example of such misappropriation of Union funds. (9-10) Once again, he claimed that the allegation is based on what he was told by people whose names he does not know. (9-10)

11. Appellant alleges at Paragraph 15(k) of the complaint that "unauthorized, excessive and improper salary increases" have been given to union officers and staff without membership approval. This allegation is no more than a repeat of Paragraph 15(i) - according to appellant's deposition testimony. (11) He is again complaining of the alleged practice of appointing elected officials to additional positions. As with Paragraph 15(i), appellant's information, vague and general as it is, stems from outright and unreliable hearsay. (11)

12 Paragraph 15(1) of the complaint charges that a "shlush" fund has been created to pay unauthorized out-of-pocket officer and staff expenses without any accounting for same. Appellant is completely bereft of any facts to support what is an outrageous charge of misappropriation of funds. (12) Instead, he can only lamely state that other members, whose names he does not know, have told him about this general charge. (12)

13. In Paragraph 15(m) appellant alleges that defendants have failed to advise the membership that over 80% of union funds are on deposit with the Amalgamated Bank of New York. In the first place, appellant concedes he does not know whether this is true and in the second place, does not state why it would be improper if it is true. (16) Surely the officers of the Union have the right to select a bank for Union funds. The Amalgamated Bank's role as trustee of the NMU Staff Pension Plan does not disqualify the Bank as a depository of the general funds of the Union absent evidence of conflict of interest which has not been alleged or demonstrated in this case.

14. Paragraph 15(n) of the complaint contends that shore-side NMU members in the Panama and Puerto Rico branches were not permitted to vote on the proposed Staff Plan at the November 25, 1974 meetings. Appellant was not at the Panama and Puerto Rico branch meetings on November 25, 1974. (24) Nor does he know anyone who was. (24) He claims unnamed members gave him this information but

doesn't know where they are from and whether they attended the meetings in question. (24) This is in marked contrast to the minutes of these meetings which clearly show that the proposed Plan was voted on by the Panama and Puerto Rico membership. (23-24)

At appellant's deposition it was established that he has been unemployed since 1969 and has twice ran for NMU President since that time - most recently in 1973. (30)

In the last several months appellant has been distributing a series of leaflets publicizing this lawsuit and making vicious and scurrilous attacks on NMU officials and employees in what appears to be an intense effort to draw attention to himself and provoke untoward action by the people whom he is smearing.<sup>5</sup> He has the audacity to state that these leaflets were neither prepared by him nor at his direction, although many are signed by him, contain his address and telephone number, and speak in the first person. He concedes, because he has to, that he has distributed this literature even though he has no idea whether the charges contained therein are true. (24-30) It is apparent that this lawsuit stems from this same pattern of behavior and was neither instituted in good faith, nor for good cause.

This pattern of making wild and unsupported claims is unfortunately repeated in the brief submitted in support of Mr. Dinko's appeal. In his Statement of the Case (page 5) appellant asserts

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<sup>5</sup> Several of the leaflets in question were annexed to the affidavit of Stanley B. Gruber submitted in support of the motion below, but were not included in Appellant's Appendix. The leaflets which were Exhibits 41, 42, 46 and 47 to the Gruber affidavit are appended hereto.

that he was "assaulted and beaten" while distributing leaflets in the Union hall on the day before the second session of his deposition. He also contends that he gave this deposition "while under sedation prescribed by his personal physician". Page 15 of his brief also states:

"It cannot be too strongly emphasized that it was appellant's genuine fear of reprisals, both physical and economical, from the defendants or their agents that caused him to be evasive and reluctant to reveal and name his sources of information at his deposition. Sadly, violence is nothing new to the NMU and have previously befallen rivals of union leadership. Appellant, in fact, was shot in the right arm in 1973 when he sought to press a court action to halt an NMU election because of alleged irregularities. The day before appearing for his second deposition he was beaten inside the NMU Hall; and his associates, members of his rank and file committee, have been threatened because of their support of him."

These allegations are totally untrue and are without support of any kind from the record. They represent a blatant attempt to prejudice this Court and stem from the same lack of responsibility which prompted Mr. Dinko to distribute the scurrilous and unsupported leaflets referred to above.

ARGUMENT

POINT I

THE HOLDING OF THE DISTRICT COURT THAT APPELLANT'S LETTER OF DECEMBER 17, 1974 FAILED TO SATISFY THE STATUTORY PREREQUISITES OF SECTION 501(b) OF THE ACT BY REQUESTING THE UNION OR ITS OFFICERS "TO SUE TO RECOVER DAMAGES OR SECURE AN ACCOUNTING OR OTHER APPROPRIATE RELIEF" WAS NOT "CLEARLY ERRONEOUS"

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As noted by the court below Section 501(b) of the Act 29 U.S.C. § 501(b)<sup>6</sup> establishes 3 prerequisites to the bringing of a suit with leave of the court. One of these prerequisites is the requirement that a plaintiff must request the Union "to sue or recover damages or secure an accounting or other appropriate relief".<sup>7</sup>

In Cassidy v. Horan, 405 F.2d 230, 232 (2 Cir. 1968) this Court held that the term "sue or recover" means "sue to recover".<sup>8</sup> Moreover this Court has also held that "this provision of the statute is mandatory and that its requirements cannot be met by anything short of an actual request". Coleman v. Brotherhood of Railway & Steamship Clerks, 340 F.2d 206, 208 (2 Cir. 1965).

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<sup>6</sup> The full text of Sections 501(a) and 501(b) are set forth in the addendum to this brief.

<sup>7</sup> The remaining two prerequisites are the failure of the union to bring the requested lawsuit and a showing of "good cause" to bring the action.

<sup>8</sup> See also Persico v. Daley, 239 F. Supp. 629, 630 (S.D.N.Y. 1965) and Penuelas v. Moreno, 198 F.Supp. 441 (S.D. Cal. 1961).

Accordingly, the court below properly concluded that the request requirement "is a condition precedent to a derivative suit under the (Act)"<sup>9</sup> and that failure to make such a request divests the district courts of jurisdiction.

No matter how Mr. Dinko's letter of December 17, 1974 is viewed it simply does not make any reference to the institution of court action by NMU or its officers. It threatens suit against these officers if Dinko's demands are not met, but these demands do not include a request to sue. See Levinson v. Perry, 71 LRRM 2554 (S.D.N.Y. 1969).

Appellant's brief urges that the demands for accountings contained in his letter should have been considered requests that the union "take court action for an accounting". However, the plain language of his letters does not remotely suggest such a request. Any reference to judicial precedent contained in Mr. Dinko's letter (Morrissey v. Perry) was a very clear reference to a lawsuit against the officers and not a request for them to institute suit.

In sum, this Circuit has held that a request to sue is mandatory and the court below concluded that the letter of December 17, 1974 did not rise to the level of such a request to sue. This finding was surely not "clearly erroneous" and should not be disturbed.

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<sup>9</sup> See page 4 of Part 6 of Appellant's Appendix.

## POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT APPELLANT HAD NOT MADE AN ADEQUATE SHOWING OF "GOOD CAUSE" UNDER SECTION 501(b) AND THAT, ACCORDINGLY, THE EX PARTE ORDER GRANTING LEAVE TO COMMENCE THIS ACTION SHOULD BE VACATED

Another of the three prerequisites to the granting of leave to commence an action under Section 501(b) is a showing of "good cause" to bring the action. Penuelas v. Moreno, 198 F.Supp. 441 (S.D. Cal. 1961). The requirements of a request to sue, a verified application for leave to commence the action and a showing of good cause are "clearly designed to protect union officials from unjust harassment". Coleman v. Brotherhood of Railway & Steamship Clerks, 340 F.2d 206, 208 (2 Cir. 1965). This principle was expressed in the Senate Report on the Act as follows:

"1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken union in their role as collective-bargaining agent." (2 United States Cong. & Admin. News 2323 (1959)."

In Gurton v. Arons, 339 F.2d 371, 375 (2 Cir. 1964), this Circuit adopted the Senate's reasoning as follows:

"The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except

in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations."

With regard to the particular provisions of Section 501(b) this Circuit, as well as others, has recognized that the "purpose of requiring permission to bring an action is a safeguard to protect the union officers from vexatious suits. . ." Morrissey v. Curran, 423 F.2d 393, 399 (2 Cir. 1970), which are "brought without merit or good faith." Horner v. Ferron, 362 F.2d 224, 228 (9 Cir. 1966); cert. den'd 385 U.S. 958.

In this case leave to start the action was granted ex parte, as permitted by Section 501(b). However, Judge Frankel did not have the benefit of reading appellant's deposition, or the exhibits attached to defendants' motion papers. Those documents demonstrate that good cause did not exist to commence this action in the first instance. Like any other ex parte order, the Order granting leave to start the action must be subject to being vacated upon appropriate opposition. Such a result obtained in Penuelas v. Moreno, 198 F.Supp. 441 (SD CAL 1961), where the court stated at page 449:

"The showing of good cause may be made ex parte. By hornbook law any order made ex parte may be set aside either ex parte or on motion.

The court concludes that no good cause have been shown and that the ex parte order should not have been issued.

Similarly, in Levinson v. Perry, 71 LRRM 2554 (SDNY 1969), the district court granted a motion to dismiss on the grounds that the prerequisites of Section 501(b) had not been met, after an ex parte order had issued granting permission to bring the action.

The concept of "good cause" under Section 501(b) has never been fully fleshed out by the courts. We know from Tucker v. Shaw, 378 F.2d 304, 307 (2 Cir. 1967) that a "detailed factual verified application" can establish good cause and from Levinson v. Perry, supra, that lack of personal knowledge may be a factor in determining "good cause," but is not determinative of the right to sue standing alone.

The principle of "good cause" was analyzed at some length in Penuelas v. Moreno, 198 F.Supp. 441, 444 (SD Cal 1961):

"In addition to the requirements heretofore discussed the appellant in an action under Section 501(b) in the Federal court must show "good cause." There is nothing in the section which defines "good cause" nor can the section be read as meaning that the requirement of good cause is satisfied merely by the demand for court action referred to above. If this is what Congress had intended, it could have omitted the reference to "good cause." "Good cause" must therefore mean something in addition to the demand and the refusal referred to above.

Congress desired to protect the rights of members in labor unions; Congress without questions was familiar with the great bulk of civil litigation in the courts of the States and of the United States. It is unbelievable that Congress intended that all a Union member had to do before filing action under Section 501(b) was to make a demand upon his union for

court action in some matter concerning monies or the property of the union, such as is described in Section 501(a); and then upon the mere failure or refusal of the union to sue, that such member would be immediately entitled to bring an action in the State or Federal court for relief. It was undoubtedly this thinking which motivated insertion of the words "for good cause shown."

At this point it would appear possible to delimit the boundaries of the "good cause" requirements, the only conclusion being the one reached by the courts in Penuelas and other cases, namely that "good cause," not being defined by Congress, rests in "the sound discretion of the court" in each instance. See Highway Truck Drivers & Helpers Local 107 v. Cohen, 182 F.Supp. 608 (ED Pa. 1960); aff'd, 284 F.2d 162 (3 Cir. 1960); Executive Bd. Local Union No. 28 v. IBEW, 184 F.Supp. 649, (D Md. 1960).

After reviewing the affidavit and "numerous detailed exhibits" submitted in support of the defendant officers' motion to dismiss, as well as Mr. Dinko's deposition, Judge Werker concluded that an adequate showing of good cause had not been made. There are a host of factors to support this exercise of discretion by the court below, not the least of which are the following:

1. Appellant has not been an active seaman since 1969, his primary activity in the Union being to run for the office of President against the incumbent administration whose officers are defendants in this case;

2. Most of the allegations contained in appellant's verified application are based upon "information and belief."

In some instances these allegations have been demonstrated to be complete fabrications while in the other the "information and belief" has turned out to be based on what appellant claims he was told by people he cannot name. It is submitted that this type of knowledge does not even rise to the level of "information and belief."

3. The question of the validity of the PILOT article, which is the only allegation not based upon information and belief or appellant's credibility, can be resolved on its face against appellant.

4. Appellant's first act, upon leave to commence this action being granted, was to issue a press release and hold a press conference where he leveled additional charges of impropriety against Union officials which he cannot substantiate and attempted to use the lawsuit to publicize his own cause.

5. Both before and after this action was commenced, appellant distributed a series of leaflets in which, inter alia:

- a. He accused Union officials of being Nazi sympathizers and collaborators or former members of the Communist Party;
- b. He accused a Union staff employee of using union funds and property to deal with prostitutes;
- c. He accused Union officials of owning 90% of Puerto Rico's waterfront property and half of Panama's prime properties;
- d. He accused a Union official of taking a \$100,000 under-the-table payoff from an employer;

- e. He claimed that the "Premier" of Japan had thrown NMU out of Japan;
- f. He charged that Union officials were "racketeers" and were cleaning out the Union treasury; and
- g. He claimed that Union officials were responsible for the loss of \$30,000,000 of Pension Plan assets due to poor investments.

These charges, which represent only several of numerous wild charges made by appellant, cannot be substantiated in any manner and appellant concedes that he cannot prove them.

6. There is other ample evidence of appellant's lack of credibility from the statements of Evaristo Rodriguez and Emanuel Van Eckelen, his contention that SIU "goons" take over NMU meetings, his insistence that no vote was taken at the November 25, 1974 New York meeting, and his claims that his literature is prepared and delivered to him by unknown members who prepare it without his direction.

Under these circumstances it is apparent that this case represents a classic example of an attempt to harass union officials through litigation. Clearly, Judge Werker properly exercised his discretion in determining that "good cause" had not been shown.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision of the district court should be affirmed.

Respectfully submitted,

ABRAHAM E. FREEDMAN  
Attorney for Defendants-  
Appellees

Of Counsel:

Stanley B. Gruber

## ADDENDUM

### § 501.      Fiduciary responsibility of officers of labor organizations

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

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MEMO FROM THE NATIONAL MARITIME UNION BANK AND FILE COMMITTEE

100-11111111 Place, Queens, New York, 11412 Phone 454-4338

FOR RELEASE: MONDAY, FEBRUARY 3rd, 1975.

New York City, N.Y.....Chairman Andy Dinko Announces today that a PRESS CONFERENCE will be held at the New York Sheraton Hotel, (870 Seventh Ave. N.Y.C.) in the Park Suite (Mezzanine Floor) on February 3, 1975 at 11:00 A.M. to 1:00 P.M.

I am pleased to inform you that the Honorable Marvin E. Frankel, United States District Judge for the Southern District of New York, on January 27, 1975 granted your application for permission to commence a suit on behalf of the membership of the National Maritime Union of America (NMU) against the Union's principal officers and the Trustees of its Officers' and Staff Pension Plans.

Judge Frankel found "good cause shown" for it appearing that money held in trust by the NMU's officers solely for the benefit of the Union and its members has been expended in violation of both the Union's constitution and by-laws, and the Labor Management Reporting and Disclosure Act.

More specifically, we charged that the NMU's officers had violated their fiduciary duties by guaranteeing pension and severance pay to staff members without membership knowledge or authorization. We charge that officers have received excessive travel and expense allowances, unauthorized salary increases of 200-300% and reimbursement for expenses, again, all without membership approval or accounting and disclosure procedures.

Additionally, we allege that the NMU Staff Pension Plan, which provides lump-sum, severance and pension payments to Union officers and staff, was adopted in violation of the Union Constitution for the following reasons:

- a. The notice of the proposal given the Union membership was deceptive, inaccurate and incomplete;
- b. Members were denied the opportunity to examine the full texts of the Plan and to speak out on its merits at Union meetings;
- c. Members were not permitted to see any financial reports or accountings describing the type or even amount of benefits to be accorded Union officers and staff, and the cost to the membership of such benefits;
- d. Members were not informed that at the will of Union officers over 80% of NMU funds are on deposit in the bank chosen by such officers to act as trustee of their own pension plan; and
- e. Thousands of shore-side members in the Panama Canal Zone and Puerto Rico were not permitted the opportunity to vote on the pension plan.

The action seeks from the Court: an order setting aside the Staff Pension Plan; an injunction against the payment of further sums to Union officers and staff; and independent, Court ordered accounting and examination of the NMU; damages on behalf of the Union; and the establishment of a membership Watch Dog Committee, under Court direction, to supervise the expenditure of NMU funds in order to protect the membership from a continuing misappropriation of the Union treasury. COURT ORDER COPIES ON HAND AT CONFERENCE.

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FOR IMMEDIATE RELEASE: MONDAY, FEBRUARY 3rd, 1975

NATIONAL MARITIME UNION  
RANK AND FILE COMMITTEE  
ANDY DINKO, CHAIRMAN

THE COMMITTEE ANNOUNCES THAT ON JANUARY 27, 1975 THE FEDERAL DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK GRANTED PERMISSION FOR THE COMMITTEE TO COMMENCE A SUIT ON BEHALF OF THE MEMBERSHIP OF THE NATIONAL MARITIME UNION OF AMERICA.

THE CHAIRMAN ON BEHALF OF THE COMMITTEE CHARGED THAT MONEY HELD IN TRUST BY THE NATIONAL MARITIME UNION OFFICERS HAS BEEN EXPENDED IN VIOLATION OF UNION CONSTITUTION, BY-LAWS AND THE LABOR MANAGEMENT REPORTING DISCLOSURE ACT.

MORE SPECIFICALLY, CHAIRMAN DINKO CHARGED THAT THE NMU OFFICERS HAD VIOLATED THEIR FUDICIARY DUTIES IN MANAGEMENT OF THE FUNDS, THAT THE MEMBERSHIP OF THE NMU WERE DECEIVED AND MIS-INFORMED AS TO THE AMOUNTS AND RECIPIENTS OF EXCESSIVELY UN-CONSCIONABLE PAYMENTS.

IN ADDITION, CHAIRMAN DINKO CHARGED THAT THOUSANDS OF NMU MEMBERS WERE DEPRIVED OF INFORMATION AS TO THE DISPOSITION OF MONIES, AND DEPRIVED OF THE RIGHT TO VOTE BECAUSE OF MANIPULATION OF THE PRESENT NMU HEIRACHY.

THE RANK AND FILE COMMITTEE IS REQUESTING THE FEDERAL COURT TO FREEZE AND SET ASIDE THE PAYMENTS OF ANY FURTHER SUMS TO UNION OFFICERS PENDING A FULL EXAMINATION AND ACCOUNTING OF EXPENDITURES AMOUNTING TO HUNDREDS OF THOUSANDS OF DOLLARS IN VIOLATION OF UNION PRINCIPLES AND PURPOSES.

THE COMMITTEE IS REQUESTING THE FEDERAL COURT TO ESTABLISH A WATCH DOG COMMITTEE UNDER FEDERAL JURISDICTION AND SUPERVISION TO PROTECT THE NMU MEMBERSHIP FROM FURTHER RAIDS ON THE UNION TREASURY.

FOR FURTHER INFORMATION CALL: (212) 454-4338

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HEY WALL, LET'S FIRE  
BRIET BEFORE THE  
WATCHDOG COMMITTEE PUTS  
US ALL IN JAIL

UNITED STATES WENT TO S.I.U.

7<sup>th</sup> AVENUE BUILDING SOLD

NO PASSENGER SHIPS

\$30,000,000 LOST FROM PENSION PLAN

15,000 JOBS LOST

BMO-DISAFFILIATED

LOCAL 333, UMD, MARINE OFFICERS DISAFFILIATED

SEND YOUR SUPPORT  
TO YOUR MEMBERSHIP  
COMMITTEE C/O  
CHAIRMAN DINICO  
109-08 FIREWOOD PL.  
HOLLIS, NEW YORK 11412  
OR CALL  
212-454-4338

MILLER

### FOR THE FUTURE

SELL NEW ORLEANS BUILDING FOR MORE MONEY

INCREASE DUES

GIVE AWAY ALL JOBS

SELL WHAT REMAINS OF UNION TO S.I.U. AND

KEEP TREASURY FOR OUR OWN GANG.

WE WILL GET RID OF ALL BLACKS, SPANISH AND  
JEWS

BEFORE  
GOT MY  
CITIZEN  
PAPERS  
I DIDN'T  
TELL U.S.  
IMMIGRATION  
THAT I  
WAS A  
MEMBER  
OF THE  
PARTY

BOCKER



4a

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

ANDY DINKO, etc.

Plaintiff-Appellant,

- against -

SHANNON J. WALL, et al.,

Defendants-Appellees,

Index No.

Affidavit of Personal Service

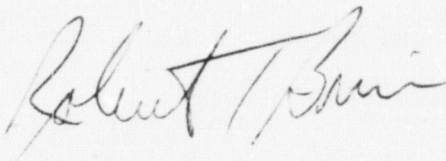
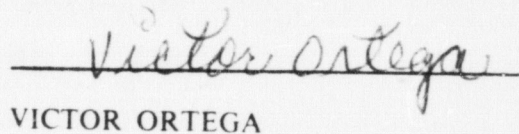
STATE OF NEW YORK, COUNTY OF New York

ss.:

I, Victor Ortega, *being duly sworn,*  
 depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
 1027 Avenue St. John, Bronx, New York

That on the 10th day of Nov. 1975 at 1) Melvin E. Rosenthal  
 277 Broadway, N.Y., N.Y.  
 2) Szold Brandwen Myers & Altman  
 30 Broad St., N.Y., N.Y. upon  
 3) Wilkie Farr & Gallagher  
 1 Chase Manhattan Plaza, N.Y., N.Y.  
 the Attorney in this action by delivering a true copy thereof to said individual  
 personally. Deponent knew the person so served to be the person mentioned and described in said  
 papers as the Attorney(s) herein.

Sworn to before me, this 10th  
 day of November 19 75

VICTOR ORTEGA

ROBERT T. BRIN  
 NOTARY PUBLIC, State of New York  
 No. 31-0418950  
 Qualified in New York County  
 Commission Expires March 30, 1977